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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 61

JOHN HUGHES AND LOUIS RICHARDSON,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPENING BRIEF FOR PETITIONERS

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OPENING BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Supreme Court of the State of California (R. 90) below is reported in 32 Cal. (2d) 850. The opinion of the District Court of Appeal, First Appellate District, Division One, State of California (R. 61) was not officially reported but can be found in 82 A.C.A. 491, 186P(2d) 756.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered November 1, 1948, and rehearing was

denied November 29, 1948. Jurisdiction of this Court is invoked under § 28 U. S. Code Section 1257. The decision below decided an important question of Constitutional law involving freedom of expression and is a case "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . . of . . . the United States."

The Federal question—whether the First and Fourteenth Amendments guaranteed petitioners the right to engage in peaceful picketing under the circumstances of this case—was raised below as follows: (a) in the trial court (The Superior Court of the State of California in and for the County of Contra Costa) by petitioners' opposition to the preliminary injunction (R. 21-24); (b) in the trial court at the time the judgments of contempt were entered, as appears from the admissions and denials in the State of California District Court of Appeal (R. 40, 52); and (c) in the California District Court of Appeal, by petitioners' petition for writ of certiorari (R. 39, 40). The respondent was the losing party in the District Court of Appeal, and petitioned the Supreme Court of California for a hearing, which was granted. The Supreme Court decided the constitutional issue against petitioners, two judges dissenting (R. 98-111). The issue was again raised by Petition for Rehearing (R. 112), which was denied (R. 120).

Statement of the Case

On May 20, 1947, Lucky Stores, Incorporated, herein called Lucky, filed in the Superior Court of the State of California, for the County of Contra Costa, herein called respondent, a verified complaint for injunction naming various organizations and individuals as defendants (R. 1-18). So far as here material, the complaint alleged that there existed a collective bargaining contract between

Lucky and Retail Clerks Union, Local No. 1179 (AFL), under which the Union was the sole collective bargaining agent for all its employees; a copy of which contract was attached to the complaint (R. 8-18); that the contract provided that Lucky employ only members of the union, unless the union was unable to supply satisfactory employees, in which event Lucky might employ non-union employees, who, however, must join the union within a specified time (R. 8-9); that the defendants demanded that Lucky "agree to hire Negro clerks, such hiring to be based upon the proportion of white and Negro customers patronizing plaintiff's stores" (R. 4); that this demand was refused by plaintiff (R. 4); that compliance with the demand would violate the contract between Lucky and the union (R. 4); that by reason of the refusal of Lucky to comply with their demands, defendants picketed Lucky's Canal Street Store in the City of Richmond, State of California (R. 5);[1] that unless this picketing were restrained Lucky would suffer irreparable damage and be forced to close the store in question (R. 5); that such picketing was an infringement on Lucky's right to do business and would require Lucky to violate the contract with the union above mentioned (R. 6).[2]

On the same day, May 20, 1947, the above mentioned Superior Court issued a Temporary Restraining Order, restraining the defendants from, among other things, picketing Lucky Stores for the purpose of compelling Lucky to engage in the selective hiring of Negro clerks in proportion to Negro customers (R. 35).

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[1] Lucky is a chain store with many retail outlets; this controversy concerns only the Canal Street Store in Richmond, California.

[2] The complaint and later the preliminary injunction also referred to certain demands with respect to the arrest of an alleged shoplifter. Since the picketing did not touch this question, both appellate courts below did not consider this aspect and it will not be dealt with herein.

On May 26, 1947, petitioners Richardson and Hughes filed counter-affidavits in support of a motion to dissolve the temporary restraining order and to deny the preliminary injunction (R. 26, 29). The affidavit of Richardson was in substance as follows: That he was the president of the National Association for the Advancement of Colored People, Richmond Chapter, herein called NAACP, one of the defendant organizations; that on May 17, 1947, he and others had met with officials of Lucky, requesting it, among other things, gradually to hire Negro clerks until the proportion of Negro to white clerks approximated the proportion of Negro and white customers; that he asked that such increase in the proportion of Negro clerks take place as white clerks quit or were transferred by Lucky; that he and other members of the delegation explicitly stated that they were not requesting the discharge of any of the present employees of Lucky but were only requesting that vacancies be filled with Negroes until the approximate proportion was reached; that representatives of Lucky refused to discuss the proposal and the discussion ended (R. 29-30); that at the time of the discussion he had no knowledge of the above mentioned contract between Lucky and the Clerks Union; that the union had unemployed Negro members and could supply qualified Negro clerks if Lucky requested such help; that the NAACP had unemployed Negro members who were qualified clerks and could supply such persons to the Union and Lucky and that such NAACP members would join the Union (R. 31); that picketing of Lucky's store took place on May 19, 1947, and continued until May 21, 1947, when the picketing ceased; that the picketing was peaceful and without violence or misrepresentation of any sort; that there were never more than six pickets patrolling an area more than one hundred feet in extent; that the employees and customers of Lucky had free ingress and egress to and from the store without molestation; that the pickets

made no comments to customers or employees and the placards they carried were truthful (R. 31). Richardson also alleged that the NAACP had as its primary purpose to promote the social and economic advancement of Negroes, to assist them in finding employment and to encourage in business and industry their full and fair employment; that the NAACP had a number of unemployed members in the area, including qualified Negro clerks; that the NAACP was concerned with finding jobs for and preventing discrimination against unemployed Negro citizens; that the NAACP had approximately 500 members, 98 per cent of whom were Negro (R. 29). The counter-affidavit of Hughes was similar to that of Richardson (R. 26-28). Hughes alleged that approximately 50 per cent of the customers at Lucky's Canal Street store were Negroes (R. 27).

On May 26, 1947, after a hearing on an Order to Show Cause, the matter was submitted to the respondent Superior Court on the complaint, counter-affidavits of Hughes and Richardson, points and authorities, and argument. No affidavits were filed by Lucky, and the counter-affidavits of Richardson and Hughes are uncontroverted.[3] The same day, May 26, 1947, the court determined that Lucky was entitled to a preliminary injunction (R. 34) and on June 5, 1947, issued its formal order granting the preliminary injunction, restraining, among other acts, picketing to compel "The selective hiring of Negro clerks, such hiring to be based on the proportion of white and Negro customers" of Lucky (R. 35).

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[3] Lucky attempted to file certain affidavits in the District Court of Appeal, below, but was denied this right under state practice (R. 67-68). The State Supreme Court did not pass on this question. These affidavits are printed as part of the record herein (R. 45-50), but, as stated, the appellate courts in California refused to consider them on the ground that they were not properly before the court.

On June 21, 1947, citations were issued and served upon petitioners ordering them to show cause why they should not be punished for contempt for violating the preliminary injunction. It was stipulated between the parties that on June 21, 1947, the two petitioners picketed the Canal Store of Lucky carrying a placard reading: "Lucky won't hire Negro clerks in proportion to Negro trade, don't patronize." (R. 38, 43). On June 23, 1947, petitioners moved to vacate the preliminary injunction, which motion was denied. The court found petitioners guilty of contempt and adjudged that they be imprisoned for two days and pay a fine of Twenty Dollars. A ten-day stay of execution was granted (R. 35-36). On June 23, 1947 a petition for a writ of certiorari was filed in the District Court of Appeal, First District, Division One, State of California (R. 36-41). The writ was granted (R. 41-43).

On November 20, 1947, the District Court of Appeal, all three justices concurring, held that the preliminary injunction was in excess of the jurisdiction of the trial court since it violated petitioners' rights under the First and Fourteenth Amendments, and annulled the judgment of contempt (R. 61-83).

Respondent Superior Court thereafter petitioned the Supreme Court of the State of California for hearing, which petition was granted. On November 1, 1948, the California Supreme Court reversed the decision of the District Court of Appeal and affirmed the judgment of contempt (R. 90-120). Four justices concurred in the majority opinion and two justices dissented. On November 29, 1948 petition for rehearing was denied, two justices dissenting (R. 120).

Certiorari was granted by this Court on May 2, 1949, 336 U. S. 966.

Questions Presented and Errors of the Supreme Court of California Specified

The question before this Court is whether the California Supreme Court erred in holding that peaceful picketing of a retail store in a Negro neighborhood for the purpose of inducing the operators of the store in the course of personnel changes to hire Negro employees in proportion to Negro customers, is not within the protection of the First and Fourteenth Amendments to the Constitution.

ARGUMENT

I. Introduction

The Constitutional principles applicable in picketing cases have been evolved by this Court in the dozen years that have elapsed between the *Senn*[4] case and the most recent utterance of the Court on the subject, *Giboney* v. *Empire Storage and Ice Co.*, —— U. S. ——, 69 Sup. Ct. 684. It was the celebrated *dictum* of Mr. Justice Brandeis in the *Senn* case, which first intimated that picketing was a form of free speech. The identification of picketing with free speech became a holding of the Court in *Thornhill* v. *Alabama*, 310 U. S. 88, *Carlson* v. *California*, 310 U. S. 106, and *American Federation of Labor* v. *Swing*, 312 U. S. 321.

Following the *Thornhill* and *Swing* cases, various decisions have indicated that the constitutional right to picket is not absolute and have pointed out some of the limitations. *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722; *Bakery Wagon Drivers* v. *Wohl*, 315 U. S. 769; *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287; *Giboney* v. *Empire Storage and Ice Co.*, *supra*. Indeed, some commentators have expressed the view that the qualifications

[4] *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468.

on the right to picket have tended to obscure its Constitutional origin.[5]

Whatever may be the appropriate limits of the right to picket, we earnestly believe that the instant case presents the strongest factual justification for constitutional protection of any picketing case considered by this Court since the *Thornhill* decision in 1937. If the picketing here was improper, it may well be necessary to revise the conception that picketing can be sheltered by the First and Fourteenth Amendments.

II. The Picketing in the Instant Case Was Purely An Expression of Speech, Without Any "Non-Speech" Aspects, and Hence Is Within the Area of Communication of Ideas Protected by the First and Fourteenth Amendments.

The decisions which have upheld the limitation of speech in picketing cases have in all instances involved substantial "non-speech" elements. Thus the States have been permitted to enjoin picketing enmeshed with a pattern of violence. *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287. In contrast, the picketing here was admittedly peaceful, there was no obstruction of ingress or egress, and Lucky's customers and employees were not hindered in any way (R. 28, 31).

The facts of the dispute herein were tersely but fully stated in the placards carried by Petitioners. There were no misstatements of fact or false representations. Cf. *Magill Bros.* v. *Building Service Union*, 20 Cal. (2d) 506; *Cafeteria Workers* v. *Angelos*, 320 U. S. 293.

The picketing was conducted at the point of dispute and

[5] Armstrong, *Where Are We Going With Picketing?* 36 *Cal. L. Rev.* 1. See Teller, *Picketing and Free Speech*, 56 *Harv. L. Rev.* 180; Dodd, *Picketing and Free Speech: A Dissent*, 56 *Harv. L. Rev.* 513; Teller, *Picketing and Free Speech: A Reply*, 56 *Harv. L. Rev.* 532.

had no elements of secondary boycott. There was hence no "conscription of neutrals", as in *Ritter's Cafe, supra*, 315 U. S. 722.

Moreover, the pickets were representatives of small, relatively weak citizens' groups concerned with the promotion of the economic and social advancement of the Negro people. The uncontroverted affidavit of the Petitioner Richardson discloses . . . "There are approximately five hundred members of the Richmond Branch of the NAACP, including a number of unemployed members." (R. 29).

Here was no strong labor union able to command sympathy and support from union members regardless of the merit of the dispute. Truck drivers and other haulers of supplies had no formal or tacit understanding, as sometimes is the case in trade union disputes, to observe the picket lines and cease deliveries. Petitioners lacked the united strength, financial and otherwise, of thousands of dues paying members to assist them in their efforts. (See Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 201, quoted by Justice Traynor in his dissent below): There was no "powerful transportation combination", with "patrolling, and . . . formation of a picket line warning union men not to cross at the peril of their union membership", adverted to by Mr. Justice Black in the *Gibonej* decision, *supra*, —— U. S. ——, 69 Sup. Ct. 684, as one of the reasons for upholding the injunction in that case.

On the contrary, all that the Petitioners did was to publicize their grievance against Lucky for the brief space of a few hours by means of placards. Petitioners doubtless could have used newspapers or handbills to inform the public of their dispute, in which event the picketing aspect would have been absent and there would probably have been no injunction. But as they are here in *forma pauperis*,

it is understandable that they chose to use placards, which are par excellence the poor man's means of publicizing grievances. Petitioners, and others in such situations, should not be afforded any lesser degree of constitutional immunity than those who are able to employ the traditional means of communication. *Terminiello v. City of Chicago*, —— U. S. ——, 93 L. Ed. (Adv. Op.) 865.

III. Petitioners' Motive for Picketing Was Proper and the Picketing Was Not for an "Unlawful Objective."

A. *The Depressed Condition of the Negro People.*

Assuming, without conceding, that the extension to peaceful picketing of constitutional sanction depends upon the motives of the picketers, we submit that a demand for the hiring of Negroes in proportion to their patronage is not unlawful, and that picketing in support of such a demand is directed to a lawful objective. Properly to evaluate the justification of the demand requires some understanding of the economic difficulties faced by the Negro in the United States.

In his dissenting opinion below (R. 106), Justice Carter stated:

"It must be admitted by every thinking person that Negroes are, and have been, constantly discriminated against. They are considered by some people as being fit for only the most menial positions. It was even found necessary for the Legislature of the various states to pass laws that they might obtain shelter and food on an equal basis with members of the white race. The abolition of slavery did not free the Negro from the chains his color imposes on him."

Justice Carter's observations are borne out by numerous sociological treatises on the subordinate role in the economy

to which the Negro has been condemned since Emancipation.[6] The files and reports of the President's Fair Employment Practices Committee show a depressing picture of the economic discrimination that has confronted the Negro attempting to find employment. They show beyond cavil that the Negro for the most part finds employment opportunities only in the most menial capacities, and that he is invariably "the last to be hired and the first to be fired."[7]

This Court has had frequent occasion to note the obstacles thrown in the path of the Negro people in their struggle against economic discrimination.[8] The Court has not merely noted such discrimination: it has stood as a firm champion of the oppressed Negro people. As Justice Murphy stated in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192:

> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged.
>
> "Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that

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[6] No attempt will be made to collect this data herein, but the Court's attention is directed to Myrdal, *An American Dilemma*, Chapter 1; McWilliams, *Race Discrimination and the Law*, 9 Science & Society, p. 1; Murray, *Right of Equal Opportunity in Employment*, 33 California Law Rev. 388.

[7] See the First Report of the Fair Employment Practices Committee, 1943-1944, Chapter V and tables. The Fair Employment Practices Committee, generally known as the F.E.P.C., was established by Executive Order No. 8802 on June 25, 1941. Its powers were further defined by Exec. Orders No. 8823, July 18, 1941 and No. 9111, March 25, 1942. See Maslow, *FEPC—A Case History*, 13 Univ. of Chicago Law Rev. 407. See also *To Secure These Rights*, Report of President's Committee on Civil Rights, 1947.

[8] See, for example, *Smith* v. *Allwright*, 321 U. S. 649; *Tunstall* v. *Brotherhood of L. F. & E.*, 323 U. S. 210; *Shelly* v. *Kraemer*, 334 U. S. 1;

abhors it, to expose and condemn it whenever it appears in the course of a statutory interpretation."

The Negro people's struggle for equality is made more difficult by the varied forms which discrimination takes. It may consist of an openly acknowledged exclusion of Negroes from membership in a social or professional organization. Or, on the other hand, such exclusion may be accompanied by denial of a discriminatory policy. Discrimination may be enforced through the medium of segregation, which results in unequal facilities for the Negro minority in education, travel, and in many other activities. It may take the form of "quotas," by which arbitrary limits are set on the participation of Negroes in many of the pursuits essential to a full life. Whatever the form, the effect on the Negro members of the community is the same: the denial of the right to be judged, and to participate fully in the manifold activities of American life, on the basis of individual merit rather than on the basis of skin coloration.

It is in the field of employment opportunities that the virus of race discrimination has its most destructive effects, on the Negro people and the nation as a whole.[9] While the goal of equal opportunity in employment for Negroes has become part of our national public policy, candor requires the admission that very little has been done to implement the goal, as witness the unhappy fate of Fair Employment Practices legislation in Congress. Nevertheless, economic equality for the Negro must continue to be sought through every possible means, not only because justice and reason require it, but because, as is widely recognized, the existence in our nation of a large, depressed economic group is incompatible with the healthy functioning of our economic system.

[9] "To Secure These Rights", Sec. II, Subdivision 4, Report of the President's Committee on Civil Rights, 1947.

Faced with discrimination in every phase of their struggle for livelihood, the Negro people have learned that their problems cannot be solved by mere wishing, or by denunciations of discrimination in general. Experience has taught them that progress is made by the application of their energies, together with those of others who are in accord with their aims, to the correction of specific evils. The means adopted to meet the problems of discrimination in employment may be national, state-wide, or local in scope. They may take the form of encouraging remedial legislation. They may be expressed in fund-raising efforts to provide for the higher education of Negro youth. They may involve community wide educational campaigns. They may take the form of court action, as in the restrictive covenant suits. Or they may take the form which the Petitioners adopted in the present case: negotiations with a business establishment in an effort to obtain jobs for Negro people and protest through peaceful picketing when the officials of the establishment refuse to give fair consideration to the problem.

It cannot be argued that the organizations Petitioners represented did not have a legitimate economic interest to advance. Their members, some of them qualified clerks, were unemployed. They attempted, by negotiation, to win employment for their members at a store where the appeal could be effective because of the substantial Negro composition of the neighborhood. They sought not the discharge of any one then employed, but only a share of future vacancies. It is submitted that when Lucky summarily rejected their requests, they were entitled to make the facts known to Lucky's customers by the method of peaceful picketing.

Nor is the foregoing conclusion altered by the fact that Petitioners were acting on behalf of a racial group rather than in connection with a purely trade union dispute. Pick-

eting, as protected free speech, cannot be limited to trade unions. Indeed, the implication of *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, is that the right of Negroes to seek to enhance their employment opportunities may be more substantial than the rights of union members, since the discrimination against Negroes is so much greater.

State Courts have sometimes afforded protection to racial pickets (*Lifshitz* v. *Straughn*, 261 App. Div. 757, 27 N. Y. Supp. (2d) 193; *Anora Amusement Corp.* v. *Doe*, 171 Misc. 279, 12 N. Y. Supp. (2d) 400; *Stevens* v. *West Philadelphia Youth Civic League*, 34 Pa. D. & C. 612) and sometimes have enjoined such picketing (*A. S. Beck Shoe Corp.* v. *V. Johnson*, 153 Misc. 363, 274 N. Y. Supp. 946; *Green* v. *Samuelson*, 168 Md. 421, 178 Atl. 109; *Texas Motion Picture and Vitaphone Operators Union* v. *Galveston Motion Picture Operators Local*, 132 S. W. (2d) 299 (Tex. Civ. App. 1939)). Both the *Green* and *Beck* cases were decided before the *Senn* case; neither case discussed the applicability of the First and Fourteenth Amendements.

We submit that, in the light of the considerations discussed above, Petitioners' demand for jobs for Negroes, far from having an "Unlawful objective," was calculated to alleviate a tremendous social evil and was in furtherance of one of the highest aims of American democracy—equality of economic opportunity for all, regardless of race or color.

B. *The Absence of Any Attempt To Induce Breach of Contract.*

Lucky's original complaint was based primarily on the theory that the defendants were attempting to induce a breach of contract between Lucky and the Retail Clerks Union. Neither Lucky nor respondent pressed the hypothesis very strongly in the Appellate Courts of California and presumably have abandoned it. Nevertheless, on the

strength of the possibility the respondents may revive the contention, we shall quote the effective answer given by Justice Peters in the District Court of Appeal (R. 68-70), as follows:

"In the first place, there are no facts pleaded that demonstrate that petitioners' actions in picketing to secure the proportional hiring of Negro clerks would necessarily result in a breach of contract between the union and Lucky Stores. The picketing Negroes did not demand the discharge of any existing employees, except the employee who had fired the shot in arresting Jackson, and the picketing was not directed at this last-mentioned objective. The demand was that, as white help quit or was transferred, they be replaced with Negroes. The evidence shows that the union is willing to accept Negro clerks, and that, in fact, at all times here pertinent, it had qualified Negro clerks in the union who were unemployed.

"In the second place, and this is a complete answer to this contention, while it is now the law of California that, under certain circumstances, a deliberate and intentional interference with an existing contract is tortious and actionable (*Imperial Ice Co.* v. *Rossier*, 18 Cal. (2d) 33 (112 P. 2d 631)), it is clearly the law that such interference may, in a proper case, be justified and therefore privileged. The *Rossier* case expressly recognizes that justification may exist for such an interference with the contract rights of others. It is there stated (18 Cal. 2d at p. 35) 'Such justification exists when a person induces a breach of contract to protect an interest that has greater social value than insuring the stability of the contract. (Rest. Torts, § 767.) Thus, a person is justified in inducing the breach of a contract, the enforcement of which would be injurious to health, safety, or good morals.' (Citing two cases and the Restatement of Torts, § 767 (d).) The interest of labor in improv-

ing working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. (Citing many cases.) In numerous other situations justification exists (see Rest. Torts, secs. 766 to 774), depending upon the importance of the interest protected.' It should be noted that in the comment on clause (d) of section 767 of the Restatement of Torts, cited *supra*, which is the section that enumerates the interests that create the privilege, it is stated that attempts to prevent racial discrimination come within the privilege. That this is so would seem quite clear. The economic interest of Negroes in securing employment for members of their race, and in attempting to alleviate the results of a discriminatory employment policy, are of sufficient social importance to justify the interference with the type of contract here involved."

We submit that no more need be said regarding Petitioners' alleged attempt to induce breach of contract.

C. *Propriety of the Demand for Hiring Negroes in Proportion to Patronage:*

The Court below assumed that the demand of Petitioners for "proportionate" hiring had as its objective "The *discriminatory* hiring of a fixed proportion of Negroes, *regardless of all other considerations*" (R. 91) (emphasis added). This assumption that Petitioners demanded discrimination in favor of Negroes is gratuitous and ignores the most important considerations presented by the record.

The store in question was located in a Negro neighborhood with 50 per cent of the customers being Negroes. Qualified Negro clerks—members of the Retail Clerks Union—were available for employment. Yet there is no contention

that Lucky hired Negro clerks in numbers even approximating its Negro trade. Indeed, the record does not show that Lucky hired any Negro clerks at all.

If there is no discrimination against Negroes, one would expect to find them gainfully employed in various pursuits in approximately the same proportion that their population bears to the nation as a whole. Certainly, one would expect Negroes to be employed as salespersons in shops in the areas where they lived.

Whether or not one agrees with the wisdom of the demand, it certainly cannot be deemed unreasonable to request that a retail store employ Negro clerks in numbers roughly approximating the proportion of the store's Negro trade. Indeed, since Negroes are consistently excluded from many types of employment, an allocation of jobs on a proportionate basis means in practice an increase in the number of jobs available to Negroes and the alleviation of the existing condition of discrimination.

In his dissent below, Justice Carter correctly analyzed the objective of Petitioners when he stated, (R. 105-106) "Petitioners are seeking nondiscrimination, not discrimination. Discrimination is treatment which is not equal. It follows that nondiscrimination must be equal treatment. Petitioners are seeking just that, and nothing more. It has long been established in equity, that the court will look through form to substance. It has also been said often and emphatically that in equity each case must be decided on its own facts, hence it might logically follow that in a neighborhood predominately Chinese or Japanese, or on an Indian reservation that picketing for a proportional hiring of members of the particular race involved would be just, equitable and entirely in accord with sound public policy. It is not involved here. But involved here is a store situated in a district where the population is composed of a

large majority of members of the Negro race. These members of the Negro race comprise at least 50 per cent of the customers of the store in question. The Petitioners by means of peaceful picketing and through the words printed on their placards were seeking to publicize their grievance to members of their race, and to members of the white race in sympathy with their long struggle for freedom, so that economic pressure might be exerted to gain for them equality in the labor field. They requested only that a proportionate number of Negro clerks be hired as replacements where necessary. Not that any white person be fired that they might be hired . . . It has been said that Negroes may obtain equal opportunities with others for employment by organization, public meetings, propaganda and by personal solicitation. The effectiveness of these methods may well be doubted. Labor, as a whole, found that the only way it might attain its objectives of better working conditions, hours and pay was to exert economic pressure on employers. Nothing else was heeded. Is the Negro here to be denied his only effective means of communicating to the public the facts in connection with the discrimination against him, and the only effective method by which he may achieve nondiscrimination?"

Moreover, Petitioners' conduct was not unlawful even if it be assumed that they were seeking preferential treatment, that is, that they wanted more jobs for Negroes as clerks than would have been the case if Lucky had followed a non-discriminatory hiring policy. Equity, as Justice Carter pointed out, *supra*, is concerned with substance rather than form. Special consideration does not become "discrimination" where its beneficiaries are a uniquely oppressed and exploited social group, such as women and children before the advent of minimum wage legislation. See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 394-395.

To characterize the quest of Negroes for equal job opportunities as "discrimination" against whites is to invoke the "fictitious equality" which this Court condemned in *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63, and again in the *Parrish* case, *supra*. Only if the shoe were on the other foot, and the dominant white group sought further to depress the Negro, would the concept of "discrimination" become relevant and meaningful. See *Willis* v. *Local No. 106*, 26 Ohio N. P. (N. S.) 435; compare *Sheily* v. *Kraemer*, 334 U. S. 1.

The California Supreme Court, in its majority holding reversing the unanimous decision of the District Court of Appeal relied on *James* v. *Marinship Corp.*, 25 Cal. (2d) 721, and two related California cases, *Williams* v. *International etc. of Boilermakers*, 27 Cal. (2d) 586 and *Thompson* v. *Moore Drydock Co.*, 27 Cal. (2d) 595. In the *Marinship* case a Union had a closed shop agreement with an employer, providing that only members of the Union could be employed. The Union did not admit Negroes to full membership; they were required to pay union dues but were segregated into separate lodges with fewer privileges than white members. Under these circumstances, the Court held that public policy forbade both a closed shop and a closed union. The *Williams* and *Thompson* cases held similarly.

Declaring that "race and color are inherent qualities which no degree of striving or of other qualifications for a particular job could meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join" (R. 96), the court below concluded that the instant situation was controlled by the *Marinship* decision.

With due respect to the California Supreme Court, whose original decision in the *Marinship* case marked an epochal advance in the struggle of the Negro people against dis-

crimination, it is impossible to follow the logic which equates the Negro race with a "closed union". The latter remains "closed" because of the voluntary action of its membership. If the public interest so requires it can be forced to open its ranks to persons of all races and colors. Should it decline to eliminate racial discrimination by action fully within its control, it is not unfair to deny judicial protection to its contractually established job monopoly.

The Negro people are in an entirely different category, if their ranks are "closed" to non-Negroes, it is not because of choice but through the happenstance of birth. As Justice Traynor pointed out in his dissenting opinion below, the Negro people is a group "helpless to open its ranks to all" (R. 108). Indeed, it may legitimately be doubted whether there are many who seek the privilege of incorporation into the racial ranks of Negro, since that "privilege" is accompanied by political, social and economic disenfranchisement. To compare such "exclusiveness" with that of a union having a deliberate policy of racial discrimination, is to play with words and ignore realities.

IV. Peaceful Picketing Is Not Withdrawn from Constitutional Protection Because Its Object Is Deemed by the State Court to Be Contrary to Public Policy, Although Not Violative of Any Statute.

We have previously stated our belief that the court below erred in concluding that the picketing was for an "unlawful purpose." The question arises, however, as to whether petitioners had a constitutional right to picket even if the purpose was "unlawful", in the sense in which the lower court used the term. It must be noted that there is here no question of violating any law—federal, state or municipal. The "illegality", if such it be, resulted from the California

Supreme Court's own conception of public policy, unaided by legislative determination.

Consequently, the instant case is sharply distinguishable from such decisions as *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, and *Gibonay* v. *Empire Storage & Ice Company*, — U. S. —, 69 S. Ct. 684, where the picketing was in direct opposition to valid state legislative enactments. In the instant case the picketing was not only entirely peaceful, but it violated no law except the judge-made law formulated after the event.

The question is thus raised of whether a State court can, by resorting to its own conception of what constitutes an illegal purpose, define and circumscribe the area in which the constitutional guarantee of free speech shall operate.

It is, of course, obvious that different States may, and in fact do, have different conceptions of public policy. In some areas of the nation, particularly those areas characterized by separate schools for colored and white children, segregated transportation, laws against miscegenation, etc., picketing for equal rights for Negroes may well be deemed subversive of public policy. In other States, such as California, such picketing would in all probability be held to be for a lawful objective. Numerous other widely differing conceptions of public policy may readily be imagined. It would, we submit, lead to an intolerable situation if the fundamental right of free speech, unadulterated by extraneous elements of a non-speech character, were made to depend on the varying social concepts of the different judges who make up the courts of last resort in the forty-eight States of the Union. An acceptance of such an interpretation will involve an abdication by this Court of its position as ultimate interpreter of the Constitution.

We think that the controlling principle is that enunciated by Justice Brandeis in *Duplex Printing Company* v. *Deering*,

254 U. S. 443, 488, which was quoted with approval by this Court in its latest decision on picketing, *Gibonev* v. *Empire Storage and Ice Company*, — U. S. —, 69 S. Ct. 684:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. *But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands.* This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat (italics added)."

In view of the circumstances of the picketing in the present case—its entirely peaceful character, the complete absence of threats or violence or other non-speech elements, the reliance on nothing except an appeal to the reason and sympathies of the public, without even an appeal to organized labor which might have enhanced the persuasive power of the picketing, and the fact that the Petitioners' conduct violated no positive law—we submit that the proper test of whether the picketing transcended the bounds of legality was that of "clear and present danger" rather than that of "unlawful objective". *Terminiello* v. *Chicago*, — U. S. —, 93 L. Ed. (Ad. Op.) 865; *Bridges* v. *California*, 314 U. S. 252; *Craig* v. *Harney*, 331 U. S 367.

Clearly, peaceful, non-violent picketing by two individuals for a few hours, for the purpose of persuading a large employer to hire some Negro personnel, is not "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, *supra*, 93 L. Ed. (Adv. Op.) at 868. Even had the objective been accomplished, and Lucky thereby been induced to contribute slightly toward

the reduction of the disproportionately high incidence of Negro unemployment in the State of California, the result would not endanger the peace and welfare of the people of the State.

The restrictive decision of the court below signifies, we believe, a trend on the part of the State courts toward rejection of this Court's decisions establishing peaceful picketing as an exercise of free speech. See e. g., Armstrong: "Where Are We Going with Picketing," 36 Calif. L. Rev. 1. Unless this trend is reversed by a clear statement by this Court of the extent to which peaceful picketing is immune from state judicial action, labor and the nation may again be subjected to the evil of "government by injunction". This case presents an opportunity to put a stop to this dangerous trend.

V. The Principles of the New Negro Alliance Case Are Applicable and Should Be Controlling

The State Supreme Court, pointing out that *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, was concerned with the question "whether the case made by the pleading involves or grows out of a labor dispute within the meaning of Section 13 of the Norris-LaGuardia Act", concluded that the case did not involve "any controlling constitutional principle", and that it provided no precedent of value" in resolving any of the issues of the instant case (R. 96). In other words, the Court below was of the view that the issue in the *New Negro Alliance* case was entirely procedural and that no questions of substantive law were involved.

We do not understand that the *New Negro Alliance* case can be so limited. The legality of picketing cannot be determined solely by the presence or absence of anti-injunction statutes, State or Federal. It is no longer open to question

that the right of peaceful picketing is protected by the First Amendment and that the right may be exercised "without special statutory authorization by a state." *Senn v. Tile Layers Protective Organization*, 301 U. S. 468. *New Negro Alliance* seems to us to stand for the broad proposition that Negroes and their organizations have a legitimate economic interest in the question of the employment of Negroes, and that peaceful picketing is an appropriate means of communicating to the public their grievances concerning this question.

The striking factual similarity of the *New Negro Alliance* case and the instant case is apparent from the following recital, taken from the opinion of this Court (303 U. S. at 559):

"The case, then, as it stood for judgment, was this: The petitioners requested the respondent to adopt a policy of employing Negro clerks in certain of its stores in the course of personnel changes; the respondent ignored the request and the petitioners caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said: 'Do Your Part! Buy Where You Can Work! No Negroes Employed Here!' and caused or threatened a similar patrol of two other stores of respondent. The information borne by the placard was true. The patrolling did not coerce or intimidate respondent's customers; did not physically obstruct, interfere with, or harass persons desiring to enter the store, the picket acted in an orderly manner, and his conduct did not cause crowds to gathe in front of the store."

After deciding that the case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, the Court declared:

"The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discrimination against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliations. There is no justification in the apparent purposes or the express terms of the Act for limiting its definitions of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race and color."

Thus, the opinion demonstrates the belief of this Court that picketing to rectify racial discrimination is every whit as socially justifiable and important as labor picketing, which is constitutionally protected. The inference is irresistible that this Court regards the former type of picketing as equally within the constitutional guarantee.

Conclusion

This case is concerned with the concrete application of certain generally accepted abstractions. Thus, it can hardly be denied that the Negro people have been victims of economic discrimination. Most persons would also agree that they are entitled to seek to overcome this discrimination and obtain economic equality.[19] Had Petitioners charged Lucky with discriminating against Negroes in hiring clerks and demanded that such discrimination cease, an injunction doubtless would not have issued. (See majority opinion in the State Supreme Court, R. 95).

[19] See *Green v. Samuelson*, 168 Md. 421.

Here, however, Petitioners went a step further. They sought not merely equality to compete on the open market for jobs, an equality shown by experience to be of dubious value to Negroes, but they requested that a definite percentage of Negroes be hired as vacancies occurred. We submit that the valuable right of peaceful picketing should not be made to depend on the distinction between a general demand for the ending of discrimination, and a concrete demand for a number of jobs, roughly proportionate to Negro patronage.

A reversal of the decision below will help to stem the growing trend of the state courts toward curbing free speech deemed in conflict with the courts' own conceptions of public policy, which differ widely from state to state; will enlarge the scope of effective action by Negroes in their fight to equality of economic opportunity; and will add another to the notable list of decisions of this Court which have aided the Negro people in their attempts to attain full citizenship.

Dated at Oakland, California, October 14, 1949.

Respectfully submitted,

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